Dan Smoot Report

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WHY SPARE THE COURT?

The May 5, 1969, issue of *Life* exposed improper connections between Abe Fortas, Supreme Court Justice, and Louis E. Wolfson, in prison after conviction in three federal criminal cases. On May 14, Fortas resigned from the Court.

A shining knight of totalitarian liberalism had been dehorsed. Eric Sevareid almost wept when reporting the news. In a "Fortas was wrong, BUT . . ." column, Drew Pearson cited great services Fortas rendered in the past. The greatest, according to Pearson, was Fortas's defense (with his "own time and money") of Owen Lattimore — who had been exposed by Senator Joseph McCarthy and indicted for perjury. Lattimore is the man whom the Senate Internal Security Subcommittee characterized as a conscious, articulate instrument of the international communist conspiracy.

Prominent liberals did not dare defend Fortas's associations with Wolfson; but many of them grieved about what they call "the tragedy of Abe Fortas." It *is* a tragedy that such a dishonest, money-grubbing, influence-peddling character was at the apex of power in Washington for 30 years; but that is not what totalitarians mean.

To liberals, the tragedy is not that Abe did what he did, but that he got caught. Getting caught, he tainted them all, because he is the perfect embodiment of the totalitarian liberalism that has dominated the political and intellectual life of America for a generation.

With pious pretensions of being humanitarian, totalitarians have ignored the Constitution and violated the laws, plundering productive citizens to finance programs ostensibly intended to help mankind. They seldom give much of their own private fortunes to help others. The portion of mankind helped by the billions taken from the public treasury to pay for liberal benefactions are the liberals who arrange the taking, and the greedy who support totalitarian political leadership for the special favors they themselves receive from the high and mighty.

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Totalitarians have been so long in control, have acquired so much wealth and power, and have become so self-righteous about doing it all for the benefit of humanity, that they feel they can do no wrong. Like Harry Hopkins, most other liberals consider the people "too damn dumb to think." It follows that liberal leaders must take money from the people to do things for the people that the people are too stupid to do for themselves. From that necessity, flows another: totalitarian leaders themselves must be above the laws they make for others, because the leaders need leeway and flexibility to do to and for the public what they deem to be good for the general welfare.

Since other totalitarians cannot publicly justify Fortas's lust for loot and power without revealing that they themselves are infected with the same amoral malignancy, most of them now want the public to forget the "unfortunate errors" Fortas made, to remember only the "good he did," and to sweep all the rest under the rug.

Liberals are almost abed with grief and anxiety about the blot which their hero, Abe Fortas, has put on the 'scutcheon of their idol, the Warren Court. Note, for example, *The Washington Post.* In 1968, the *Post* flayed and flogged as hypocrites all Southern Senators who opposed Fortas's elevation to Chief Justice. Now, the *Post* mourns that the Fortas scandal could discredit the great work which the great Warren Court has done during the past 15 years — work which Fortas himself greatly promoted, as a defender of the Court before he sat upon it, and as a participant in its great liberal decisions after he became a member.[1]

Even President Nixon, who denounced the Supreme Court in 1968, now wants to protect it. The Nixon administration is eager to close the books on the Fortas affair "to spare the Court further embarrassment."[2]

Why spare the Court? For 15 years, this little oligarchy, under the leadership of Earl Warren, has arrogated unto itself the illegal power to corrupt and violate the Constitution and laws of the land in order to provide what Abe Fortas himself once proudly said the Court was providing and should provide — namely, a "powerful impetus, even imperatives, for the drive towards a greater social order."[3]

Legalized pornography which is being used in a calculated effort to debauch our youth; raging lawlessness which is destroying our schools and colleges, and eliminating all semblance of law and order in a civilized society — these are two distinguishing features of the "greater social order" which the Warren Court has helped drive us into.

Spare the Court now, so that the public will respect it? No! It should be exposed for what it has become, and the malefactions of its members fully publicized, until the public has lost all respect for the present Court. Then, Congress may be moved to exercise its constitutional powers and responsibilities — to strip the Court of all appellate jurisdiction it has assumed and abused.

When the people are thoroughly aroused about the behavior of the Supreme Court, the President and the Senate will exercise more caution in filling Court vacancies.

Public and congressional indignation about Fortas abated considerably on May 21, 1969 (one week after Fortas's resignation), when President Nixon announced that his nominee for Chief Justice was Warren Earl Burger (judge of the Circuit Court of Appeals in the District of Columbia). Though prominent in the legal profession, Burger was virtually unknown to the public. The little that was known about him looked good.

Nixon wanted to nominate a liberal internationalist, Charles S. Rhyne, as I (in the November 4, 1968, issue of this *Report*) guessed he would. Why didn't he? He and Rhyne are old cronies, and the country was in a furore about the Johnson cronyism that had put Fortas on the Court.[4]

Because of the public attitude at the moment — the President picked a non-controversial man of good repute with whom he had no close ties, for a position publicly symbolizing the entire Court, to brighten the tarnished image of the Court, just when public esteem for the Court was at lowest ebb.

Thus, my point is proven: the best way to guarantee caution in the selection of future Supreme

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Court justices is for the public to display total disgust for the Court as presently constituted.

Nixon first met Burger in 1948 at the Republican National Convention where they both supported the candidacy of CFR-member Harold E. Stassen. At the 1952 Convention, Burger and Stassen swung Minnesota delegates to Eisenhower, assuring the defeat of Taft.[5] Eisenhower rewarded Burger by appointing him Assistant U.S. Attorney General. In 1954, Burger represented the U.S. government as an advisory member-delegate to a conference of the International Labor Organization. In 1956, Eisenhower appointed Burger to his present judgeship.

Since 1959, Burger has been a board member of the Mayo Foundation. He gets an annual fee of $2000 for attending a four-day trusteeship meeting once a year. On May 23, he said he had not decided whether to resign his Mayo Foundation job if he becomes Chief Justice.[5] Two days before, at the first news of the Burger nomination (when Congress and the public were wrought up about Abe Fortas and William O. Douglas and their moonlighting jobs with tax-exempt foundations), it was reported that Judge Burger *would* resign from the Mayo Foundation.

In citing these facts, I do not mean to belittle President Nixon's nomination of Burger. If Burger is the kind of man the general press says he is, the nomination will forever reflect credit on Nixon, regardless of motives at the moment of nomination.

The general press says Judge Burger is a strict constitutionalist. If so, his whims, prejudices, political ideas, and personal desires will not dictate his judicial decisions. He will be restrained in his official functions by the knowledge that the Supreme Court does not have valid authority to change the Constitution of the United States or the laws of Congress by "reinterpreting" them to make them mean what Court members want them to mean. If Burger is that kind of Chief Justice, he will be an immense blessing to the country.

The people should urge President Nixon to select constitutionalists for *all* court vacancies.

The President should not, as many now suggest, seek a "balance" on the Supreme Court. He should not nominate men because they are known as political liberals or political conservatives. He should not select men because they are Negroes or whites; Protestants, Catholics, or Jews. He should nominate men who understand the Constitution well enough to know that it cannot be legally changed, or any of its meanings legally altered, except by the people themselves through the due process of amendment — law-abiding men with enough character and integrity to remember and honor their solemn pledge, made when they take the oath of office, to uphold the Constitution *as it presently exists*, regardless of whether they personally like all its present provisions.

Before nominating and confirming anyone to be a judge, the President and every U.S. Senator should re-read, and reflect upon, Number 78 of *The Federalist Papers*, written by Alexander Hamilton, one of the Founding Fathers:

"To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge."

Compare that standard for federal judges with the standard that Abe Fortas set. What a falling off was there!

The Fortas affair must not be forgotten, just because Fortas resigned. There are strong indications that the man criminally violated federal

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laws. [6] If so, he should be prosecuted. It is not necessary for our well-being as a people and a nation that the public respect the Supreme Court as an institution; but it is necessary for our survival as a civilized society that the public generally respect the law. How can the public respect the law if it is openly flaunted, with impunity, by a man who sat at the very top of our legal system?

Fortas is no isolated exception. In some details, the Douglas scandal is more malodorous than the Fortas scandal.

Justice Abe Fortas had indirect connections with Nevada gambling interests. *Justice William O. Douglas* was the salaried president of a tax-exempt foundation created and financed by profits from the gambling tables of Las Vegas.

Justice Fortas accepted a $20,000 fee from the tax-exempt Wolfson Family Foundation at a time when Louis E. Wolfson, under investigation for alleged criminal violations of federal law, was being represented by Fortas's old law firm in which Mrs. Fortas had taken her husband's place as a principal partner. *Justice Douglas* accepted some $85,000 in fees, over a period of seven years, from the Albert Parvin Foundation. The government named Albert Parvin a co-conspirator with Wolfson in some of the activities which sent Wolfson to prison, though Parvin was never indicted.

Justice Fortas resigned from the Wolfson Foundation and refunded the fee he had accepted, before his connection with the Foundation was publicly disclosed. Ten days after disclosure of that past connection, Fortas resigned from the Supreme Court. *Justice Douglas* contemptuously ignored congressional and public demands for his resignation when his salaried connection with the Albert Parvin Foundation became public knowledge in 1966; and Chief Justice Earl Warren defended Douglas on the grounds that his activities in the Parvin Foundation were his personal business.[7] In the wake of the Fortas scandal, there were renewed demands that Douglas resign from the Supreme Court. Douglas resigned his foundation job, but said he had no intention of leaving the Court.[8]

For a long time, the public has fatalistically accepted the destructive official behavior of Supreme Court Justices, wrongly assuming that nothing could be done about it. But the private wheeling and dealing of Douglas and Fortas have moved the public to angry indignation. If that indignation can be sustained, and informed with facts, we might get a house cleaning in the marble hall that has come to seem more like the Augean stables than like a noble sanctuary of justice.

Believing this sincerely, I will devote ensuing issues of this *Report* to a review of some of the known details about the extra-judicial activities and associations of Abe Fortas and Justice William O. Douglas.

FOOTNOTES

(1) *The Washington Post*, Sept. 22, 1968, and May 6, 1969

(2) *The Wall Street Journal*, May 13, 1969

(3) UPI story from Washington, by Richard Lerner, May 15, 1969

(4) *The Dallas Times Herald*, May 23, 1969, p. A28; "How Mr. Nixon Made His Choice," *U.S. News & World Report*, June 2, 1969, p. 33

(5) Article by Robert E. Baskin, *The Dallas Morning News*, May 23, 1969, p. A3; AP dispatch from Washington, May 23, 1969

(6) Remarks of Congressman H. R. Gross, quoted in *Human Events*, May 24, 1969, p. 4; Laws concerning activities of federal officials cited in *The Dallas Morning News*, May 19, 1969, p. 1; *The Washington Evening Star*, May 12, 1969

(7) Details on the Wolfson-Fortas and Douglas-Parvin scandals are in material put in the *Congressional Record* by Senator John Williams, May 5, 1969, pp. S4509-S4516.

(8) Article by Barnard L. Collier, *The Dallas Morning News*, May 26, 1969, p. D3

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